FILED
JUL 26 1999
OFFICE OF THE CLERK

No. 98-1838

IN THE

Supreme Court of the United States

ROBERTA COHEN, GREGORY ELLIOTT
and ROBERT SILVERMAN,

Petitioners,

v.

RECREATION AND PARK COMMISSION FOR THE PARISH OF EAST BATON ROUGE (BREC); J.W. COCREHAM, individually and in his official capacity as chairman of BREC; RIPLEY WILKINSON, individually and in his official capacity as vice-chairman of BREC; WILLIAM H. ELAM, individually and in his official capacity as treasurer of BREC; EUGENE YOUNG, individually and in his official capacity as superintendent of BREC; and THE BATON ROUGE GALLERY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

LEU ANNE LESTER GRECO
Counsel of Record
GRECO & GRECO (ALC)
Attorneys for Respondents
522 Europe Street
Baton Rouge, Louisiana 70802
(225) 344-3774

154119

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, The Baton Rouge Gallery, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

REASONS FOR DENYING THE WRIT

Review on writ of certiorari is not a matter of right, but of judicial discretion, and is granted only for compelling reasons. United States Supreme Court Rule 10. Under Rule 10, review is appropriate here if the state appellate court has decided an important federal question that has not been but should be settled by this Court, or in a way that conflicts with relevant decisions of this Court.

An isolated alleged constitutional violation that could not recur does not call for review. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 76-77, 75 S. Ct. 614, 99 L. Ed. 897 (1955). Even assuming petitioners prevailed in establishing a violation of their rights, such a violation cannot be repeated. Ms. Cohen, whose work was the basis of the controversy, withdrew from membership in the Baton Rouge Gallery, Inc., and so will have no future exhibitions as a member artist. Following the rediscovery of its own authority to supervise the content of exhibitions, the Baton Rouge Gallery, Inc. ("BRG") established exhibition review procedures, which obviate any BREC concern about exhibition content. (Even given the period when the BRG Board erroneously believed it could not exercise any curatorial authority, this is the sole occasion since the inception of the Gallery in 1983 when any BREC Commissioner felt it necessary to express an opinion as to exhibition content.)

Nor is a writ of certiorari normally granted to review a decision that turns solely upon an analysis of facts. *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503, 71 S. Ct. 453, 95 L. Ed. 479 (1951). "Granting of the writ would not be warranted merely to review the evidence or inferences drawn

from it." *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178-179, 58 S. Ct. 849, 82 L. Ed. 1273 (1938).

Contrary to petitioners' characterization of the appellate court's ruling as presented in their questions presented for review, the appellate court did not find no liability simply because the individual commissioners did not take a formal vote; the court found they had taken no *action* to effect a closure of the gallery or removal of the work. The court found no individual commissioner nor BREC closed or ordered closure of the gallery or removal of the work, but rather that the closure was effected by BRG and the removal by petitioners.

Three of the respondent BREC Commissioners visited the gallery on the day the exhibit was closed. (Respondent BREC Superintendent Eugene Young, while previously expressing concern about the work, took no action other than asking the Commissioners to view the exhibit to form their own opinions.) After the Commissioners left, the President of BRG eventually decided to lock the doors of the gallery because "we wanted to control the space"; he "felt that it was important to take control of the space . . . to lock the gallery." Petition for Writ of Certiorari, Appendix A, page App.16-17. Three days later, respondents removed their work before any resolution of the controversy could be reached. The BRG Board, after rediscovering that it did have curatorial control, subsequently voted not to reschedule the exhibit.

The state appellate court noted that by state statute, BREC's authority is vested in the Commission as an entity, not in any individual commissioner, and found that no meeting was held and no vote was taken, thus eliminating

any question of action by BREC. The court also found that the individual commissioners did not order removal of the work nor the closure of the gallery, but merely individually expressed an opinion that the work creating the controversy should be removed or the gallery should be closed.

> Given the unique facts of this case, we find the government agency did not take any official action to close the gallery. Individual commissioners expressed their thoughts regarding the controversial artwork. In essence, they were exercising their first amendment rights in relation to the contents of the exhibit. Some BREC commissioners expressed their convictions that the works should be removed or the gallery should be closed, however, neither they nor BREC went so far as to actually prevent the continued showing of the exhibit. The closure was accomplished by BRG, a private non-profit organization, and the artists took the final step in removing the art works.

Petition for Writ of Certiorari, Appendix A, page App.17.

The state appellate court correctly noted that action under color of state law is a necessary element of petitioners' claims. Based upon its factual findings, the court concluded that there was no state action in the closing of the gallery, the removal of the artwork, and the subsequent refusal to rehang the exhibition.

Contrary to petitioners' assertions in their questions presented for review, the state appellate court did not ignore nor contradict any of this Court's interpretations of federal

law. Petitioners' application fails to cite any violation of a specific precedent in the state court's recitation and application of federal law. The record contained more than a reasonable basis for the state court's factual findings and inferences; there is no suggestion that the court engaged in any fiction or subterfuge to evade application of federal law.

CONCLUSION

Respondents request that the petition for writ of certiorari be denied.

Respectfully submitted,

LEU ANNE LESTER GRECO
Counsel of Record
GRECO & GRECO (ALC)
Attorneys for Respondents
522 Europe Street
Baton Rouge, Louisiana 70802
(225) 344-3774